

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No. _____
(Leave blank.)

Plaintiff-Appellee,

Court of Appeals No. 244589 *8/31/04*
(From Court of Appeals decision.)

v

Trial Court No. 01-02471-FC
(See Court of Appeals brief or Presentence Investigation Report.)

PATRICK LEWIS

(Print the name you were convicted under on this line.)

aka Tony Briggs Defendant-Appellant. *OK*

Kent E. Butth

INSTRUCTIONS: Answer each question. Add more pages if you need more space. **NOTE:** If you are appealing a Court of Appeals decision involving an administrative agency or a civil action, you will have to replace **this page** with one containing the relevant information for that case.

127261

PRO PER APPLICATION FOR LEAVE TO APPEAL

1. I was found guilty on (Date of Plea or Verdict) April 5, 2002

2. I was convicted of (Name of offense) Murder 2nd, Felony Firearm, CCW

3. I had a ☐ guilty plea; ☐ no contest plea; ☒ jury trial; ☐ trial by judge. (Mark one that applies.)

4. I was sentenced by Judge GEORGE S. BUTH on 8-21-02
(Print or type name of judge) (Print or type date you were sentenced)

in the KENT County Circuit Court to 35 years _____ months
(Name of county where you were sentenced) (Put minimum sentence here)

to 55 years _____ months, and to 2 years _____ months to 4 years _____ months.
(Print or type maximum sentence) (Minimum sentence) (Maximum sentence)

I am in prison at the CARSON CITY CORRECTIONAL FACILITY in CARSON CITY, Michigan.
(Print or type name of prison) (Print or type city where prison is located.)

5. The Court of Appeals affirmed my conviction on August 31, 2004
(Print or type date stamped on Court of Appeals decision)

in case number 244589. A copy of that decision is attached.
(Print or type number on Court of Appeals decision)

6. ☒ This application is filed within 56 days of the Court of Appeals decision. (It MUST be received by the Court within 56 days of date on Court of Appeals decision in criminal cases and 42 days in civil cases. **Delayed applications are NOT permitted, effective September 1, 2003.**)

FILED

OCT 20 2004

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN

(Print the name of the opposing party, e.g., "People of the State of Michigan.")

v

Plaintiff-Appellee,

PATRICK LEWIS

(Print the name you were convicted under on this line.)

Defendant-Appellant.

Supreme Court No. _____
(Leave blank.)

Court of Appeals No. **244589**
(From Court of Appeals decision.)

Trial Court No. **61-02471-FC**
(See Court of Appeals brief or Presentence Investigation Report.)

MOTION FOR WAIVER OF FEES AND COSTS

Appellant, pursuant to MCR 7.319(7)(h) and MCL 600.2963, for the reasons stated in the attached affidavit of indigency, requests that this Court: (Check the ones that apply to you.)

☒ GRANT a waiver pursuant to MCR 7.319(7)(h) of all fees required for filing the attached pleadings because the provisions of MCL 600.2963, requiring prisoners to pay filing fees do not apply to appeals from a decision involving a criminal conviction or appeals from a decision of an administrative agency. The statute applies *exclusively* to prisoners filing civil cases and appeals in civil cases.

☐ GRANT a waiver pursuant to MCR 7.319(7)(h) of all fees required for filing the attached pleadings because the provisions of MCL 600.2963, requiring only indigent prisoners to pay court filing fees violates the equal protection provision of the Michigan Constitution, Art I, Sec 2.

☐ Temporarily waive the initial partial payment of filing fees for the attached pleadings and order the Michigan Department of Correction to collect and pay the money to this Court at a later date in accordance with MCL 600.2963, when the money becomes available in appellant's prison account. If the Court does not allow this, I will be prevented from filing the attached pleading in a timely manner.

☐ Allow an initial partial payment of \$ _____ of the fee for filing the attached pleadings and order the Michigan Department of Correction to collect the remaining money and pay it to this Court at a later date in accordance with MCL 600.2963, as additional money becomes available in my prison account. If the Court does not allow this, I will be prevented from filing the attached pleading in a timely manner.

October 11, 2004

(Date)

Patrick Lewis

(Sign your name here.)

PATRICK LEWIS 156554

(Print your name and number here.)

Boyer Road/P.O. Box 5000

(Print your address here.)

Carson City, MI. 48811-5000

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

PATRICK LEWIS

, Defendant-Appellant

CA No. 244589

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 on page 7.

GROUND S - ISSUES RAISED IN COURT OF APPEALS

7. I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below.

ISSUE I:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

The Kent County Jury Selection process suffered from a computer programming error which caused it to systematically exclude African-Americans and other minorities from the venire. Mr. Lewis was denied his constitutional right to a jury drawn from a fair cross section of the community. The conviction should be reversed.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☒ 2. The issue raises a legal principle which is very important to Michigan law.
- ☒ 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- ☐ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in "B" apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

Pertaining to the issues mentioned above, 2 of 3 Court of Appeals Judges concluded the defendant failed to properly preserve the challenge to the array before the jury was empanelled and sworn; and that also, defendant failed to meet his burden of proof with regard to systematic exclusion when he presented inadmissible hearsay. I disagree. Although unaware to a computer program error occurring during the time frame of defendant's trial, Ginther Hearing testimony by defense counsel will show that the defendant still, in fact, made assertions for defense counsel to object to the jury array before and during trial. Due to timidity or just pure lack of obligation to protect clients interest, counsel did not object. This action was clearly unfair and a

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ISSUE I

miscarriage of just has been done to the defendant due to the prejudice error. The Courts can not continue to overlook the fact that had counsel not rejected defendant's repeated pleas, the challenge to jury array would been timely preserved. Counsel's neglect to not protect client's interest when requested was error that infringed on defendant's 6th and 14th Amendment constitutional rights of Due Process and Equal Protection. Because of such error it is the Supreme Court's obligation to waive defendant's failure to properly preserve jury array issue.

Also the Appeal Court incorrectly applied the ruling of People v. McKinney, 258 Mich App 157,161 (2003) in support of their decision where it was implied defendant failed to properly preserve the challenge to the array before the jury was empanelled and sworn.

This is not applicable to defendant's case. Where McKinney probably did fail to properly preserve issue, defendant in this case was actually deprived of his right to do so. The **Ginther** record will show, that it wasn't for lack of effort that defendant did not timely preserve the challenge to jury array, but that by counsel rejecting the defendant's repeated assertions to object to the array, defendant was then literally kept or deprived from making a timely challenge.

Next, the Court of Appeals decided the defendant did not show proof of systematic exclusion, I disagree.

Proof of systematic exclusion exist where (noted in Attorney's Brief) Kent County Official publicly acknowledged that foe a period of sixteen months in 2001 and 2002 representation of African-Americans in that County's jury venire was not fair and reasonable in relation to the number of such person in that community, and that this underrepresntation was due to systematic exclusion of the group, not by deliberate actions of any member of that

ISSUE I

community but by an apparent programming error in a county-run computer system that went undetected until late July of 2002 (I was convicted April 15, 2002) Incidentally it is also noted that Honorable Chief Kent County Judge Buth also acknowledged the problem.

To reject this factual proof as inadmissible hearsay would be unfair and a miscarriage of justice will result, especially being the defendant (under the circumstances) has exhausted all other resources to prove his case.

Finally, the Appeal Courts stated that the possible flaws in the jury selection system do not translate into a flawed in the jury selection process. I disagree.

Where the potential exist for a flaw in the jury selection system, the jury selection process can not then be reliable due to the probability that the fair cross section of the community might just have been excluded. Moreover, possible flaws are still suspect. It is the Supreme Court duty to not let these flaws infringe upon an individual's constitutional rights. The mere existence of a possible flaw infringing on ones' rights should at least warrant a remand to ensure these rights aren't violated. Reverse or remand is required.

PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

PATRICK LEWIS, Defendant-Appellant

CA No. 244589

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8, on page 7.

ISSUE II:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

In this Second Degree Murder trial, counsel conducted no investigation, interviewed no witnesses, subpoenaed no witnesses, failed to lodge necessary objections, failed to communicate with the defendant and otherwise failed to perform at a level of reasonable competence. Mr. Lewis was denied the effective assistance of counsel. Reversal is required.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☒ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☐ 2. The issue raises a legal principle which is very important to Michigan law.
- ☒ 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- ☒ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

Following the review of Appellant's Ginther Hearing Remand, the Court of Appeals voted 2 to 1 affirming Appellant's conviction in which it was implied the defendant received effective assistance of counsel. Here, the affirming judge's decision was improper and conflicts with dissenting Judge S. Borrello decision and other Court of Appeals decisions (noted thru-out argument) which pertains to this very issue. The Ginther record reveals numerous omissions confirmed by defense counsel that contributed to depriving defendant a fair trial. Incidentally it is also the defendant's contention that it was error by Appeal Court judges to overlook the Ginther Court Judge's decision to reject deficiencies (confessed by defense counsel) that occurred during

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ISSUE II

representation of defendant without first establishing a ruling whether or not any of the acknowledged deficiencies infact constitute a violation of the constitutional rights to effective assistance of counsel People v. Leblanc, 465 Mich 575,579 (2002). Deficiencies substantiated by defense counsel should not be rejected where the possibility exist they were detrimental to the defense. Remand is required.

FACTS TO BE CONSIDERED:

As a showing of facts toward the Appellant's effective assistance claims, the Ginther Hearing record reveals defense counsel undeniably substantiated numerous deficiencies such as; (1) failing to interview and subpoenaed witnesses; (2) failure to interview or secure rebuttal, alibi res gestae witnesses as requested; (3) failure to pursue known missing or withheld portions of witness' statements and discovery items; (4) failure to file motions (to assert alibi defense) (5) failure to investigate or file necessary motions in order to suppress illegal in-court identification witness testimony after discovering the potential of an misidentification by the uncertain witness; (6) failure to take basic action with mitigating material evidence provided by defendant, which consisted of a letter from a key prosecution witness written to defendant prior to trial that would have contradicted her testimony and impeached her; (7) neglecting to object to (suspect) all white jury were requested, infringing defendant's 6th and 14th Amendment constitutional rights. (8) Failing to assign the investigation hired with Court finding to adequately investigate claims and to locate and secure witnesses; (9) and lastly, the inexplicable releasing of res gestae witness and others from testifying whom held exculpatory information.

These confirmations confessed by counsel were so detrimental and

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prejudice to the defendant's case that they clearly do undermine the presumption that counsel's actions were a matter of trial strategy People v. Snell, 118 Mich App 750 (1982).

A reasonable attorney would never have committed so many errors, therefore, the inadequate performance fell well below an objective standard of reasonableness and thus satisfies the probability but for errors the outcome of the proceeding would have been different. People v. Knapp, 244 Mich App 361,385-386 (2001)

Incidentally, where defense counsel released the res gestae witness (pertinent to the defense) without a single prior interview nor consent of defendant was error depriving defendant compulsory process to produce witnesses in the defense favor and who had knowledge of crime or whom could have proven innocence. People v. Norwood, 123 Mich App 287 (1983) And being the defendant testified he didn't commit crime; that witness mistakenly misidentified him; that he was down the street walking during the time of shooting; the alibi witness and the released res gestae witness testimony would have been valuable in persuading innocence to the jury.

However, as it stand, the admissions made by defense counsel does confirm that defendant was deprived a defense worthy of a capital crime and of the ability to make the best case in his behalf. The deficiencies clearly undermine the presumption that the lack of action taken were a matter of trial strategy. This fact becomes very obvious where according to defense counsel Ginther testimony, two witnesses existed (according to statements provided to police) that would had given exculpatory and alibi supportive testimony. The res gestae witness Mary Huges who was present during the crime, had given police a statement of the suspect's clothing description which could had exonerated defendant as the perpetrator. Another witness (Jimmy Horsley)

ISSUE II

could had corroborated the defendant's alibi testimony that defendant was down the street the moment incident occurred. Both of these witnesses would had been essential toward proving my innocence, but neither was interviewed by counsel although a court funded investigator was at her disposal People v, Caballero, 184 Mich App 638,640 (1990). It is counsel obligation to secure such witnesses, particular if part of res gestae and can support defendant's alibi testimony. Trial Counsel evidently had made a definite decision to produce or at the least interview witnesses as requested by defendant. This is apparent by the petitioning of the Court for funds for an investigation because of the "many witnesses need interviewing and an investigation to be performed." However, Counsel's failure to give the investigator the assignment was detrimental to the defendant case being that not a single witness was interviewed nor secured in the defense favor. People v. Pickens, 446 Mich 298,338 (1994); People v. Ortiz, 249 Mich App 297,311 (2001). Being the outcome of trial does depend in large measure upon the jury credibility determination regarding eyewitnesses, had either witness (particularly alibi witness) been permitted to testify on defendant's behalf , defendant's own testimony would have appeared more credible because it coincided an important respect with that of his alibi witness People v. William, 593 Mich App 236 (1978). As it be, the defendant lost the opportunity to present a substantial defense because of trial counsel's inadequate performance People v. Hyland, 212 Mich App 781 (). In no way can these actions be considered within range of constitutionally competent representantion. People v. Stark

This ineffective assistance claim does not constitute speculation on Appellant's part, nor fails to establish prejudice. The fact that trial counsel has substantiated the various deficiencies, and then, in turn verified the content of certain eyewitnesses police report statements, eliminates the

ISSUE II

element of speculation and thus should be sufficient as a showing of proof to all defendants ineffective assistance claims. Reverse and remand is required.

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

PATRICK LEWIS, Defendant-Appellant

CA No. 244589

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ISSUE III:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

The Trial Court abused its discretion where it allowed the prosecution to play a poor quality tape recording of an incriminating conversation between Mr. Lewis and a female acquaintance. The Court further erred where it allowed the jury to read a transcript of the recording prepared by the officer in charge. Reversal is required.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
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The Court of Appeal claimed the admission of mere cumulative evidence is not prejudicial. I disagree.

When the cumulative evidence used was so inaudible that police version of transcript were admitted to try and determine its content, then an adjournment should had been given in order to allow the defense to prepare their own version of transcript to ensure it's accuracy and safeguard against false and misleading prosecution tactics. As it were, the admission of the inaudible and misleading tape conversation, along with the inaccurate police version

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ISSUE III

transcripts (which was never endorsed by either witness prior to trial) allowed the prosecution to circumstantiate the evidence to their liking, while leaving the defense helpless to form a defense strategy against it. Reveal is required.


In closing, the Court of Appeals Judge Karen Fort Hood and Pat Donofrio has done the defendant an unjust by affirming the 2nd degree Murder conviction. It's reasons for the improper decision were definitely questionable. However, when considering the probably most detrimental of issues (ineffective counsel) a ruling by the Michigan Supreme Court states, a defendant must simply show there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial would have been different. If this showing is made it would be said that the conviction resulted from a breakdown of the adversary process that rendered the result unreliable. People v Hoag, 460 Mich 1, 5-6, 594 NW 2d 57 (1999) (citation omitted).

Here, the defendant has shown or achieved this task partly by way of the recorded **Ginther** hearing testimony of trial counsel. (Testimony that periodically exposes the prejudice resulting from specific inadequate actions).

The defendant prays and respectfully request that this Honorable Court reverse the conviction and set the matter for a new trial or alternatively remand for a hearing to develop the record with respect to the jury issue.

Patrick Lewis

Patrick Lewis #156554 Date: 10/11/04


WILLIAM N. DESCHANE
NOTARY PUBLIC IONIA CO., MI
MY COMMISSION EXPIRES Sep 15, 2008
ACTING IN MONTCALM COUNTY, MI

10/18/04

RELIEF REQUESTED

9. For the above reasons I request that this Court *GRANT* leave to appeal, *APPOINT* a lawyer to represent me, and *GRANT* any other relief it decides I am entitled to receive.

October 11, 2004

(Date)

PATRICK LEWIS #156554

(Print your name and number here.)

Patrick Lewis

(Sign your name here.)

Boyer Road/P.O. Box 5000

(Print your address here.)

Carson City, MI. 48811-5000

W. N. Deschaine 10/18/04

WILLIAM N. DESCHaine
NOTARY PUBLIC IONIA CO., MI
MY COMMISSION EXPIRES Sep 15, 2008
ACTING IN MONTCALM COUNTY, MI